

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

JARRELL DEVON HART,

Defendant-Appellee.

UNPUBLISHED

August 9, 2005

No. 253416

Wayne Circuit Court

LC No. 03-009152-01

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

TORIAN WILLIAM TERRELL,

Defendant-Appellee.

No. 253417

Wayne Circuit Court

LC No. 03-009152-02

Before: Whitbeck, C.J., and Sawyer and Fitzgerald, JJ.

PER CURIAM.

In these consolidated cases, the prosecutor appeals as of right from the trial court's suppression of complainant's in-court identification of defendants Jarrell Hart and Torian Terrell, and the subsequent dismissal of the criminal charges against Hart and Terrell. We affirm. We decide these appeals without oral argument pursuant to MCR 7.214(E).

I. Basic Facts And Procedural History

Complainant had his sunglasses snatched from his face as he was walking with friends to a nightclub at around midnight. Complainant began fighting with the man who took his sunglasses, allegedly Hart, in an attempt to get the sunglasses back. This fight lasted approximately ten minutes, until another man, allegedly Terrell, threatened complainant with a gun, and fired at least one warning shot. As his assailants ran away, complainant chased the two men, ending his chase when the man with the gun shot at complainant.

Complainant viewed at least one photographic lineup of suspects, and a *Wade*¹ hearing was held relating to this lineup. Because only blackened photocopies of the original photos used were available, and because the officer who conducted the lineup had no independent recollection of what had occurred, the trial court found that the lineup was unduly suggestive. Following an evidentiary hearing, the trial court found that there was no independent basis for complainant's in-court identification of Hart and Terrell.

II. Suppression Of In-Court Identification

A. Standard Of Review

We review the trial court's determination that there was no independent basis for the in-court identification for clear error.²

B. Considering The Lineup Sheets

The trial court found the photographic lineup impermissibly suggestive; therefore, for evidence concerning the identification to be admissible at trial, the trial court was required to find an independent basis for in-court identification that was “‘untainted by the suggestive pretrial procedure.’”³ The prosecutor argues that the trial court improperly considered lineup identification sheets that had been submitted with Terrell's motion to suppress when making this determination. However, the prosecutor has provided no authority in support of this argument. Therefore, this argument fails.⁴

C. Applying The Correct Evidentiary Standard

The prosecutor's argument that the trial court applied the wrong evidentiary standard is also without merit. Although the trial court initially misstated that clear and convincing evidence was a greater threshold than beyond a reasonable doubt, the trial court corrected this misapprehension before stating its final determination. Therefore, the prosecutor cannot establish that the trial court applied the wrong standard of evidentiary review.

D. Considering The Relevant Factors

The prosecutor contends that the trial court did not properly consider all the necessary factors when it found that there was no independent basis for complainant's in-court identification of Hart and Terrell. After reviewing the eight factors to be considered in making

¹ *United States v Wade*, 388 US 218; 87 S Ct 1926; 18 L Ed 2d 1149 (1967).

² *People v Gray*, 457 Mich 107, 115; 577 NW2d 92 (1998); *People v Williams*, 244 Mich App 533, 537; 624 NW2d 575 (2001).

³ *Williams*, *supra* at 542-543, quoting *People v Kurylczyk*, 443 Mich 289, 303; 505 NW2d 528 (1993).

⁴ See *People v Kelly*, 231 Mich App 627, 640-641; 588 NW2d 480 (1998).

this determination,⁵ we do not have a definite and firm conviction that the trial court was mistaken in determining that there was no independent basis for the in-court identification of Hart and Terrell.

Affirmed.

/s/ William C. Whitbeck

/s/ David H. Sawyer

/s/ E. Thomas Fitzgerald

⁵ See *Gray, supra* at 115-117.